Book 31

FILED
MAR 19 1901
JAMES H. MCKENNEY,
Clerk.

Reply Brf of Tenney, Flower & Musgrave for Appts

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

Filed Mar. 19, 1901.

No. 208.

WILSON BROTHERS ET AL., APPELLANTS,

vs.

CASSIUS B. NELSON, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF AND ARGUMENT FOR APPELLANTS.

DANIEL K. TENNEY,
JAMES M. FLOWER,
HARRISON MUSGRAVE,
Attorneys for Appellants.

(17,649.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 3-19-'01

Supreme Court of the United States.

OCTOBER TERM, A. D. 1900.

No. 208.

WILSON BROTHERS ET AL., APPELLANTS,

vs.

CASSIUS B. NELSON, APPELLEE.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief and Argument for Appellants.

The first point stated by counsel for appellee is that "the judgment and levy were not a preference, nor suffered or permitted by appellee."

If there is any doubt as to what the word "preference," as used in the act, means, it should be solved, if possible, by the provisions of the act itself. We cannot agree, however, with counsel that one may not obtain a preference without being preferred *by the debtor.*

Counsel ingeniously confuses the expressions "obtaining a preference" and "being preferred." The latter expression ordinarily implies an act of the debtor; the former does not. Nothing is more common than to say one has obtained or acquired a preference by attachment, by entry of judgment and levy, or by filing a creditor's bill, in none of which proceedings does the debtor usually participate.

Sec. 3 (*a*), subd. 3, uses the words "suffered or permitted, while insolvent, any creditor to *obtain a preference* through legal proceedings." This is not equivalent to saying "any creditor who has *been preferred* by a debtor, while insolvent." But in order to remove any doubt as to what either expression means, as used in the act, sec. 60 (*a*) provides that any person shall be deemed to have given a preference if, being insolvent, he has suffered a judgment to be entered against him, *the effect of the enforcement* of which will be to enable one creditor to obtain a greater proportion of his debt than another—*i. e.*, obtain a preference. Here the question of participation or intent of the debtor is carefully eliminated. The meaning of the word "suffer" is made clearer by being used disjunctively with "procure." As opposed to procure, it implies inaction. The word "preference" is again used in section 67 (*c*), which provides that a lien obtained pursuant to a judgment by confession within four months of the filing of the petition shall be dissolved by the adjudication of bankruptcy if "it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and *enforcement will work a preference.*" Here again the result and not the intent is made the test. In the law of 1867 the words "procure or suffer" in every instance were coupled with the expression "with intent to give a

preference." But for the learned counsel's statement (Brief, p. 7) that "the preference now, as ever, is the *debtor's* preference of the *favored* creditor over others," we should have said the omission in each case of all reference to intent clearly showed the purpose of Congress to make that an immaterial element.

Assuming, however, the contention of counsel to be correct, the result is the same. Nelson knew this judgment note was outstanding ready to be used if circumstances warranted it. He knew he was hopelessly insolvent. The judgment note was not a lien. It simply gave the right of judgment without the usual process and notice. Nelson was under no obligation, legal or moral, to favor the holder. On the contrary, the bankrupt act imposed on him, after his hopeless insolvency, the obligation to treat all creditors alike. Yet he allowed his affairs to get in such a condition as to induce the judgment and levy. He thereby "suffered" the entry of the judgment. In *re* Reichman, 91 F. R., 624, the learned judge used this course of reasoning in reference to the levy of an attachment writ, and it applies with equal force here.

There is nothing in the argument that the intent of the debtor in the obtaining of a preference through legal proceedings is an essential element, for the reason that in the second act of bankruptcy, referring to a transfer of property, there is an express provision that the transfer must be with intent to prefer. A transfer of property may be, and generally is, in the usual course of business. The act defines its meaning as follows: "'Transfer' shall include the sale and every other and dieffrent mode of disposing of or parting with property, or the possession of property abso-

lutely or conditionally, as a payment, pledge, mortgage, gift, or security" (sec. 1 (25)). The payment of a matured account, in the course of business, has been held to be such a transfer and if made, during insolvency, and within four months of the filing of a petition in bankruptcy, to be a preference under sec. 60 (*a*) (Columbus Electric Co. *vs.* Worden, 99 F. R., 400; Cir. Ct. of App., 7th Cir., Jan. 25, 1900); from which it appears yet more clearly that the word "preference," as used in the act, has no necessary reference to the intent of the debtor. It is reasonable, however, that a transfer of property, being ordinarily in the usual course of business, should not be *an act of bankruptcy* unless made *with an intent* to prefer. But it is otherwise with the entry of a judgment, levy, and sale. Such acts are never in the usual course of business, but always indications of hopeless insolvency and the cessation of business.

As to the three cases decided by this court in construing the act of 1867, and so much relied upon by counsel, it is sufficient to say that they all rest on the express terms of the act making the debtor's intent an essential ingredient; and it is to be noted that none of them was a case involving the question as to what constituted an act of bankruptcy, but they were all cases where the assignee brought suit to recover property from third parties who, it was alleged, had been fraudulently preferred. Counsel say "there is nothing in the present act which any more than the former deprives the creditors of the ordinary remedies of law when in the pursuit of a lawful end against the debtor, without guilty collusion; or, which makes a judgment attained in such pursuit a preference; nothing, in short, which qualifies the force of the opinion quoted (Iselin *vs.*

Clark) so aptly to the point now in discussion." The fact is that the three cases cited could not possibly have been decided the same way under the present act, for this act expressly provides that "all levies, judgments, attachments, or other liens obtained through legal proceedings against a person who is insolvent at any time within four months prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as part of the estate of the bankrupt" (section 67 (*f*)). That these words are capable of but one construction, and render immaterial the intent of the debtor or the question of "preference," in the sense counsel for appellee use that word, is sufficiently established by high authorities (*In re* Richards, *supra;* Bear *vs.* Chase, 99 F. R., 920, Cir. Ct. of App., 4th Cir., February 6, 1900; *In re* Kenney, 105 F. R., 897, Cir. Ct. of App., 2d Cir., December 6, 1900).

Could there have been, we repeat, any object in making every such judgment and levy void, regardless of intent, and yet in requiring as essential to an act of bankruptcy an intent on the part of the insolvent in suffering such judgment to be entered?

II.

The second point made by the learned counsel is that "It is not an act of bankruptcy by an insolvent to refrain from voluntary bankruptcy."

It does not seem quite fair to state the proposition thus na-

kedly. The entry of judgment alone was not an act of bankruptcy. It was not even a lien or a preference. The levy created the lien and established the preference. The failure to vacate or discharge the lien completed the act of bankruptcy. The section does not speak of a preference by the entry of judgment, but "through legal proceedings," which include, of course, the levy and sale. When Nelson suffered his stock to be sold, or, more accurately, when he suffered the levy to stand undischarged up to the fifth day before sale, his act of bankruptcy was complete. He had thus permitted the preference to become established and evinced his purpose not to disturb it. The section must be construed as a whole. Whether he technically suffered or permitted the *entry of judgment* is not material. The true question is, did he suffer a preference through the legal proceedings of a judgment, levy, and impending sale, he taking no steps to avoid the consummation of such preference (Parmenter *vs.* Stoever, 97 F. R., 330).

We agree with counsel that mere insolvency, however great, does not warrant an adjudication of bankruptcy. Many a merchant has recovered from such a condition. It is the policy of the law to encourage this; but when the insolvent himself shows his intent to quit, suffers his property to be levied on and advertised for sale, and up to within five days of the sale makes no move to save himself, the law says he may be declared a bankrupt. The fairness and consistency of such a provision is too evident to require argument. The insolvent has given up the struggle, and the law steps in and says there must be an equal distribution. Equality is equity. The law cannot compel the debtor to file a petition in bank-

ruptcy; but where he has abandoned his property to fighting creditors the law very properly provides that an act of bankruptcy has arisen. Counsel criticise our statement that bankruptcy could be prevented by payment, saying the payment of a judgment would be a preference. This does not follow, for, as we have shown, a payment—*i. e.*, a transfer of property—is not an act of bankruptcy unless made with intent to prefer. The payment of a judgment by the debtor with the purpose to obtain possession of his property and business in good faith and pay his debts would not be within the statute. But payment is not the only recourse of an honest debtor under such circumstances. Experience teaches that it is easy for him in most cases to obtain a compromise or an extension, if he desires to continue business, and in this manner discharge the lien of the judgment.

Counsel say (Brief, p. 21): "There is not a line or word in the bankrupt act that vacates or discharges, or authorizes to be vacated or discharged, any judgment in any other court, lawfully entered before bankruptcy in a hostile proceeding against the bankrupt without his procurement or sufferance. Counsel point out none. * * * Their claim assumes only that *the lien* of the execution levied upon personal property will be dissolved. But were that correctly assumed it would not satisfy the statute, which is that the *preferential judgment* shall be vacated or discharged by the preferring or colluding debtor." Counsel overlook section 67 (*f*), which provides "that all levies, *judgments*, attachments, or other liens, *obtained* through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bank-

ruptcy against him shall be *null and void* in case he be adjudged a bankrupt." As we have stated, it has been held by the circuit courts of appeals in the 2d, 4th, and 7th circuits that any judgment so entered, irrespective of the debtor's procurement or intent, is rendered void by this section. Counsel criticise the Richards case, the one first decided on this point; but in view of the subsequent decisions following it, we need not argue the question here.

If, therefore, counsel are correct in saying that the general rule ought to be so limited that an insolvent's failure to file a voluntary petition five days before the execution sale shall be an act of bankruptcy in those cases *only* where the judgment would be avoided by bankruptcy (Brief, p. 21), this case has been brought clearly within such limitation.

Respectfully submitted.

DANIEL K. TENNEY,
JAMES M. FLOWER,
HARRISON MUSGRAVE,
Attorneys for Appellants.

MARCH 19, 1901.